Question 3:

No answer is necessary.

We, therefore, for the reasons given quash the learned judge's order and restore the magistrate's order.

Order accordingly.

Solicitors: *N. Ramachandran & Co.*

FOO LOKE YING & ANOR. v. TELEVISION BROADCASTS LTD. & ORS.

[S.C. (Abdul Hamid C.J. (Malaya), Hashim Yeop A. Sani and Abdoolcader S.C. JJ.) May 17 & 23, 1985]

[Kuala Lumpur – Supreme Court Civil Appeal No. 133 of 1985]

Copyright – Cinematograph films made in Hongkong – Whether video tapes come within definition of cinematograph films – Publication in Malaysia – Whether copyright acquired in respect of cinematograph films – Copyright Act, 1969, ss 2, 3, 4, 5, 6, 12 & 20.

Interpretation – Statutes – Purposive and literal interpretation – Where literal meaning is clear and reflects the purposes of the enactment – Whether marginal note can be referred to – Whether explanatory statement can be referred to – International Conventions or treaties.

The first respondent, a limited company incorporated in Hongkong, are the makers and owners of the copyright in certain cinematograph films in Hongkong, and the second and third respondents are respectively the licensee and sublicensee in Malaysia. The films were video recordings to be shown on television screens for which purpose they were copied on to tapes for sale and hire as video cassettes. The films were published in Malaysia within thirty days of their first publication in Hongkong. The appellants in a representative action suing on behalf of themselves and other members of the Perak Video Tape Dealers Association issued a writ seeking a declaration that the first respondent is not entitled to copyright in Malaysia in respect of the cinematograph films produced by them in Hongkong and consequential injunctive relief and damage. George J. dismissed the appellants' claim and they appealed against the decision.

Held: (1) video-tape comes within the definition of "cinematograph film" in section 2(1) of the Cinematograph Films Act, 1969. The definition of "cinematograph film" makes no reference to cinematography or any other process but concentrates chiefly on the essential characteristic of a sequence of visual images capable of being shown as a moving picture;

(2) the marginal note to section 5 of the Copyright Act, 1969, reads "Copyright by virtue of citizenship or residence" and that to section 6 "Copyright by reference to country of origin". It is therefore abundantly clear that they are distinct provisions to be read separately and operating independently of each other;

(3) the provisions of the Act under consideration call for a purposive and literal construction which is one that follows the literal meaning of the enactment where that meaning is in accordance with the legislative purpose and applies where the literal meaning is clear and reflects the purposes of the enactment. There is no justification or warrant to read the provisions of sections 5 and 6 together so as to restrict the application of section 6 only to works eligible for copyright as specified therein of which the author is a qualified person as defined in section 5;

(4) there is no ambiguity in section 2(2) of the Act and on the provisions of the Act as they now stand "any country" must necessarily mean Malaysia and would include any other qualifying country to which the Act is extended under the provisions of any regulations if and when made under section 20. In this case there was publication in Hong Kong in the first instance and upon publication in Malaysia within a period of thirty days of the earlier publication in Hongkong within the intendment of section 2(2) (c), the provisions of section 6(1) (a) of the Act would operate to confer copyright on the films in question. The first respondent as the author is accordingly vested under section 12 of the Act with copyright in respect thereof.

Cases referred to:

(1) *R.* v. *Commisssioners of Income Tax* (1888) 22 Q.B.D. 296.
(2) *R.* v. *Ramsgate (Inhabitants)* (1827) 6 B. & C. 712, 715; 108 E.R. 613.
(3) *Warwick Film Productions Ltd.* v. *Eisinger* [1969] 1 Ch. 508, 521.
(4) *Ellerman Lines Ltd.* v. *Murray* [1931] A.C. 126.
(5) *Salomon* v. *Commissioners of Customs & Excise* [1967] 2 Q.B. 116.
(6) *Escoigne Properties Ltd.* v. *I.R.C.* [1958] A.C. 549, 566.
(7) *Becke* v. *Smith* (1836) 2 M. & W. 191, 195; 150 E.R. 724.
(8) *Asia Television Ltd. & Anor.* v. *Mega Video Recording Supply Centre* [1985] 1 M.L.J. 250.
(9) *Foo Loke Ying & Anor* v. *Television Broadcasts Ltd. & Ors.* Ipoh Civil Suit No. 1631 of 1984, unreported.
(10) *Lee Yee Seng & Ors.* v. *Golden Star Video Bhd.* [1981] 2 M.L.J. 43.
(11) *Television Broadcasts & Ors.* v. *Seremban Video Centre Sdn. Bhd.* [1985] 1 M.L.J. 171.
(12) *Bushell* v. *Hammond* [1904] 2 K.B. 563.
(13) *Reg* v. *Schildkamp* [1971] A.C. 1.
(14) *Quebec Railway, Light, Heat and Power Co. Ltd.* v. *Vandry* [1920] A.C. 662.
(15) *Enmore Estates Ltd.* v. *Darsan* [1970] A.C. 497, 506.
(16) *Asia Television Ltd. & Anor.* v. *Viwa Video Sdn. Bhd.* [1984] 2 M.L.J. 304.
(17) *South West Water Authority* v. *Rumble's* [1985] 2 W.L.R. 405, 411.

(18) *Reg* v. *Broadcasting Complaints Commission, Exparte Owen, The Times* dated January 26, 1985.
(19) *Katikiro of Buganda* v. *Attorney-General* [1961] 1 W.L.R.119.
(20) *Hadmor Productions Ltd.* v. *Hamilton* [1983]1 A.C. 191, 232.
(21) *Winfat Enterprise (H.K.) Co. Ltd.* v. *Attorney-General of Hongkong* [1985] 2 W.L.R. 786.
(22) *Seaford Court Estates Ltd.* v. *Asher.* [1949] 2 Q.B. 481.

HIGH COURT.

N.T Rajah for the plaintiffs.

Datuk V.L. Kandan (*S.F. Wong* with him) for the defendants.

Cur. Adv. Vult.

George J. : There are a number of Hong Kong companies that make cinematograph films in Hong Kong for broadcasting in the television networks there. Those companies (and their agents and/or licensees) also make the films available for being shown on individual television screens by means of videograms for which purpose the films are copied on to tapes which are sold or hired out to the public as video cassettes.

Some of those Hong Kong film makers (who are authors of the films made by them within the meaning of "author" in the interpretation section 2 of the Copyright Act of 1969) expanded their video cassette tape business into the lucrative Malaysian video tape market by appointing local companies or firms to reproduce copies of the films by video-taping them and selling or hiring them as video cassettes to members of the general public in Malaysia. The Hong Kong authors claim copyright in Malaysia to those cinematograph films by virtue of section 6(1) (a) of the Copyright Act 1969, in respect of some of the films by actual first publication thereof in Malaysia and in respect of the rest by virtue of reading section 6(1) (a) with section 2(2) (a) on the ground that there was publication of those films in Malaysia within 30 days of their first publication in Hong Kong. (The sections referred to in this judgment unless specifically stated to be otherwise are references to sections in the Copyright Act of 1969).

The relevant portions of the two sections are as follows:

"6(1) Copyright shall be conferred by this section on every work which is eligible for copyright and which –

(a) being a literary, musical or artistic work or cinematograph film is first published in Malaysia;"

"2(2) For the purposes of this Act the following provisions shall apply with respect to publication –

(a) .....
(b) .....
(c) a publication in any country shall not be treated as being other than the first publication by reason only of an earlier publication elsewhere if the two publications took place within a period of not more than thirty days."

A number of Malaysian dealers of video cassettes while accepting the fact of authorship of the Hong Kong companies project the view that those films cannot be conferred with copyright even if there was first publication here, on the ground that the authors thereof are neither Malaysian citizens nor permanent residents in Malaysia nor Malaysian companies, which status, they contend, is an essential qualification for conferment of copyright by the Act.

These dealers have been, without the consent of the authors of the films or their licensees, and with impunity, reproducing the said films into tapes and making the tapes available to the Malaysian public for hire or purchase. The authors and/or their licensees in turn have apparently been seeking the aid of the Police and/or other enforcement agencies and the Courts to stop them from doing so.

The dealers have through their representatives brought three actions in the Ipoh High Court against the Hong Kong authors of the films (and the Malaysian licencees of the authors), seeking a declaration that the Hong Kong authors are not entitled to copyright in this country in respect of cinematograph films produced by them in Hong Kong. Certain consequential orders to restrain the Hong Kong authors and their licensees from asserting the rights that owners of copyright have, are also sought.

The three actions, namely Ipoh High Court Civil Suits 1661 of 1984, 1662 of 1984 and 1631 of 1984 were tried together. In each action there was a statement of agreed facts. In each action the parties through counsel submitted only one issue to be tried *viz:*

"Whether the first defendants (in each of the actions) who make cinematograph films in Hong Kong acquire copyright in Malaysia under any of the provisions of the Copyright Act 1969 by virtue of first publication in Malaysia of those films."

It is an agreed fact that the 1st defendant in each of the actions is a limited company incorpo-

rated in Hong Kong. It is also agreed that the said films are either first published in Malaysia or are published within 30 days of their first publication or broadcast in Hong Kong and that the Hong Kong publication or broadcast is the first ever publication of the said films. Apparently there was no consensus on the effect of section 2(2) (c).

Copyright as it exists today in Malaysia is a creature of statute being a right conferred by the Copyright Act of 1969. In respect of a literary, musical or artistic work or cinematograph film, the nature of copyright is stated by section 8(1) to be (subject to certain exceptions set out in the provisos to the section with which for the purposes of the instant case we are not concerned),

"... the exclusive right to control the doing in Malaysia of any of the following acts, namely the reproduction in any material form, the communication to the public and the broadcasting, of the whole work or a substantial part thereof, either in its original form or in adaptation: ....."

Copyright is one of the class of rights which have come to be referred to as intellectual property, the others in the class being rights conferred by *inter alia* patent and trade mark legislation. The learned authors of *Copinger and Skone James* on Copyright say at paragraph 3 of the 12th Edition that copyright is rightfully called property:

"Nothing can with greater propriety be called a man's property than the fruit of his brains. The property in any article or substance accruing to him by reason of his own mechanical labour is never denied him: the labour of his mind is no less arduous and consequently no less worthy of the protection of the law."

Certain aspects of copyright could have been conferred by Common Law and perhaps even under customary law but section 3 of the Act puts paid to that:

"3. Subject to this Act, no copyright shall subsist otherwise than by virtue of this Act."

The 1969 Act was promulgated to revise and consolidate the law relating to copyright and in doing so the Act repealed all previous laws pertaining to copyright in Malaysia and revoked any relevant Orders in Council and all subsidiary legislation made under any written law so repealed.

Now, section 4 restricts works eligible for copyright to those itemised in the section. They are referred to in the Act as works eligible for copyright. I pause to note that cinematograph films are included in section 4 and accordingly are works eligible for copyright.

The Act makes a distinction between what is referred to in the Act as a qualified person (defined by section 5(1) to be an individual who is a citizen of or is a permanent resident in Malaysia or a body corporate constituted and vested with legal personality under the laws of Malaysia and established in Malaysia) and those who are not, referred to aptly by Dato' Kandan, in the context, as outsiders. The Act by section 7 recognises a third category of *persona* consisting of the Government and those making works eligible for copyright "by or under the direction or control of the Government and also of such international bodies or other Government organisation as may be prescribed." That, qualified persons and so-called outsiders can fall into this 3rd category is specifically recognised by section 7(4), which as will be seen later herein has a special significance in the context of the instant case.

As has been seen, it is only by the Act that copyright is conferred. Each of the sections 5, 6 and 7 purport to confer copyright in the terms set out therein. The relevant phrase used in each of the said three sections is: "Copyright shall be conferred by this section ...". None of the other sections purport to confer copyright.

By section 5, where the author of a work eligible for copyright is a qualified person at the time when the work is made, that work enjoys copyright from the time it is made for the period set out in section 5(2). In other words in respect of conferment of copyright on a work the author of which is a qualified person, the only requirement for conferment of copyright is that the work is eligible for copyright within the meaning of section 4. Where the work was made, whether and when it was published and any and all other factors are of no relevance – with one exception which is provided by section 7(4) that if the work was made under the control or direction of the Government, conferment of copyright thereon will be by section 7 and not by section 5. It is the author (subject to section 12) that is vested from the time the work is made with the exclusive rights (prescribed and limited by section 8). The Act is of territorial application and does not purport to give the author rights outside Malaysia – section 8, as has been seen, specifically restricts the rights conferred by the Act to apply only in Malaysia.

A work by an outsider, that is a person (or a

body corporate) that is not a qualified person within the meaning of section 5(1), is conferred copyright by section 6 if it is eligible for copyright within the meaning of section 4 of the Act and if the requirements of section 6 are made, provided the work had not been conferred copyright by section 7. Section 6 is as follows:

"6(1) Copyright shall be conferred by this section on every work which is eligible for copyright and which –

(a) being a literary, musical or artistic work or cinematograph film is first published in Malaysia;

(b) being a work of architecture is erected in Malaysia or being another artistic work is incorporated in a building located in Malaysia;

(c) being a sound recording, is made in Malaysia; and

(d) being a broadcast, is transmitted from Malaysia and which has not been the subject of copyright conferred by section 5 of this Act.

(2) Copyright conferred on a work by this section shall have the same duration as is provided in section 5 of this Act in relation to the same type of work."

While the section provides that to qualify for section 6 conferment of copyright, a work of architecture has to be erected in Malaysia, a sound recording has to be made in Malaysia and a broadcast has to be transmitted from Malaysia, in the case of a literary, musical or artistic work or cinematograph film, where the work is made is not relevant. The requirement by section 6 for conferment of copyright on that category of work is that the work is first published in Malaysia.

I pause here to agree with Dato' Kandan that the probabilities are that the intention of the legislature was that the words "and which has not been the subject of copyright conferred by section 5 of this Act" at the end of paragraph (d) of section 6(1) qualify each of the paragraphs (a), (b), (c) and (d) of section 6(1). There is merit in the suggestion that a semi-colon after the word "Malaysia" in paragraph (d) was inadvertently left out in that it makes for no good sense for those qualifying words to apply to only broadcasts and not to the other categories of works to which section 6 applies.

However for the purposes of this judgment I read the section and its paragraphs without adding on to it the missing semi-colon and find that in the case of a work which is eligible for copyright and which being a literary, musical or artistic work or cinematograph film is first published in Malaysia, if the author of the work happens to be a qualified person within the meaning of section 5 then since the making of the work must of necessity precede its publication, the work would have been conferred with copyright by section 5 prior to the publication and that therefore conferment of copyright by section 6 would be of academic interest only and is not called for. It would be an unnecessary duplication of conferment of rights which as can be seen by section 6(2) is identical and for the same duration as that conferred by section 5. Nothing turns on the missing semi-colon.

The last of the three "conferring" sections, section 7, confers copyright on works that pass the test of eligibility prescribed by section 4 and which is made by the third category of *persona* referred to herebefore. Here duplication of conferment of copyright is avoided by section 7(4) which reads as follows:

"7(4) Sections 5 and 6 of this Act shall not be taken to confer copyright on works to which this section applies."

In my judgment, the scheme of the Act is clear. It provides protection in Malaysia, by way of copyright, to three categories, first, to authors who are qualified persons (which I venture to suggest is as it should be), secondly, to such non-qualified authors whose work being architecture is erected here or being a sound recording is made here (and so on) and who in the case of literary, musical or artistic works or cinematograph films are authors who have their works first published in Malaysia (which I again suggest is also as it should be) and thirdly to the Government in respect of works made by or under its aegis (which is of course as it should be).

Now, section 2(2) prescribes provisions that apply with respect to publication for the purposes of the Act. Earlier in this judgment section 2(2) (c) was read. For the defendants it was contended that on the agreed facts and applying section 2(2) (c), for the purposes of the Act the publication in Malaysia of each of the films could and should be treated as the first publication although in respect of some of the films the actual first publication was in Hong Kong since the publication of those films in Malaysia was within 30 days of the first publication in Hong Kong. It follows, it was contended that all the films, the subject of these actions, are conferred copyright by section 6.

Encik N.T. Rajah on behalf of the plaintiffs submitted that section 2(2) (c) was ambiguous in that it was capable of more than one meaning and that it was necessary to seek the aid of certain extraneous considerations to arrive at the construc-

tion that the legislature intended to be given to the sub-subsection.

Applying the first and most elementary rule of construction it is to be assumed that the words and phrases are used in their ordinary meaning (see *R.* v. *Commissioners of Income Tax*[1] and *Maxwell* 12th Edition 28). The second rule is that phrases and sentences are to be construed according to the rules of grammar (see *R.* v. *Ramsgate (Inhabitants)*[2] and *Maxwell* 12th Edition 28). These two rules of construction read together have been referred to as the literal rule.

Applying those two rules of construction, the literal rule, I failed to see any ambiguity in the sub-subsection. *Per se* that sub-subsection is capable of only one construction:- if there is a publication of a work in each of two separate countries then if the two publications take place within a period of not more than 30 days, for the purposes of the Act each of the publications may be treated as the first publication. It was contended that the phrase "in any country" and the word "elsewhere" in the sub-subsection have specialised meanings. It was contended that if one went into the historical background for the promulgation of the Act this would become apparent.

It was also contended that if one studied the explanatory note to the Act it would become apparent that the Act was based on the Berne Convention which apparently is an international convention pertaining to copyright, a study of which would lead to the conclusion that the words "in any country" and "elsewhere" in the sub-subsection have a specialised meaning different from the ordinary and natural meaning of the words and that further it would then be obvious, if not already so, that sections 5, 6 and 7 have to be read as being interdependent of each other.

However, in the absence of any ambiguity it is not permissible to refer to the background or the preamble or to the explanatory note of the Act or to conventions or any other extraneous considerations for the purpose of giving to the section (or sections) of the Act to be construed a meaning other than its (or their) natural meaning. In *Warwick Film Productions Ltd.* v. *Eisinger*[3], Plowman J. referred to *Ellerman Lines Ltd.* v. *Murray*[4] where the principle was stated. Part of the headnote to that case is as follows:

> "**Held**, further, that the section being unambiguous it is not permissible to refer to the preamble of the Act or to the draft convention to which the Act was intended to give effect in order to give the section a meaning other than its natural meaning."

In *Saloman* v. *Commissioners of Customs & Excise*[5] Lord Diplock cited *Ellerman Lines Ltd.* with approval saying (at 143):

> " . . . Where, by a treaty, Her Majesty's Government undertakes either to introduce domestic legislation to achieve a specified result in the United Kingdom or to secure a specified result which can only be achieved by legislation, the treaty, since in English law it is not self-operating, remains irrelevant to any issue in the English courts until Her Majesty's Government has taken steps by way of legislation to fulfil its treaty obligations. Once the Government has legislated, which it may do in anticipation of the coming into effect of the treaty, as it did in this case, the court must in the first instance construe the legislation, for that is what the court has to apply. If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties (see *Ellerman Lines* v. *Murray; White Star Line and U.S. Mail Steamers Oceanic Steam Navigation Co. Ltd.* v. *Comerford*), and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own courts. But if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred. Thus, in case of lack of clarity in the words used in the legislation, the terms of the treaty are relevant to enable the court to make its choice between the possible meanings of these words by applying this presumption."

Lord Denning has said in *Escoigne Properties Ltd.* v. *I.R.C.*[6] that,

> "in this country we do not refer to the legislative history of an enactment as they do in the United States of America. We do not look at the explanatory memoranda which preface the Bills before Parliament. We do not have recourse to the pages of Hansard. All that the courts can do is to take judicial notice of the previous state of the law and of other matters generally known to well-informed people."

Another accepted rule, the so-called "golden rule" was stated by Parke B. in *Beck* v. *Smith*[7] in this way:

> "It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature *to be collected from the statute itself*, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further." (Emphasis provided).

It was also submitted on behalf of the plaintiffs that in any event because of the existence of section 20, sections 5, 6 and 7 are to be treated as interdependent sections. It was suggested that to enjoy copyright in Malaysia the requirements of both sections 5 and 6 must be met – the author must be a qualified person and there must be first publication here. It is to be noted that in submitting interdependency, the requirements of section 7 were not brought into play – no reason was suggested for this – perhaps because that would lead to an absurdity! A short answer to this suggestion of interdependency of the three sections is another look at section 6(1) (d) and section 7(4) each of which subsections demonstrate beyond any argument that conferment of copyright by one or the other of sections 5, 6 and 7 is independent of the other two sections.

What section 20 does is to give the Minister concerned the power to make regulations extending the *application of the Act* beyond the scope of its present application, such extension to depend on reciprocal protection. What is important is the extent of the application of the Act at its present stage where Malaysia is not party to any treaty or convention pertaining to copyright. I fail to see that the effect of section 20 is to give to other sections of the Act a meaning different from the ordinary and natural meaning they have.

The scope of section 20 can be illustrated thus, using, say, Nigeria as the other country: Upon ensuring reciprocity (for section 20 calls for that) the Minister may make regulations extending the application of any or all of the sections 5, 6 and 7 to Nigeria: The application of section 5 may be extended by regulations which provide that a qualified person as defined in section 5(1) will include (a) an individual who is a citizen of or is a permanent resident in Malaysia *or Nigeria* or (b) a body corporate constituted and vested with legal personality either under the laws of Malaysia and established in Malaysia *or under the laws of Nigeria and established in Nigeria*. Thus citizen, permanent resident and corporate authors of each of the two countries will because of their status enjoy copyright of their works in each of the two countries, Malaysia and Nigeria.

The application of section 6(1) may be extended by simply reading "Malaysia" therein to include "Nigeria". And with reciprocity, literary, musical or artistic work or cinematograph films first published in Malaysia *or Nigeria* will enjoy copyright in both territories as will qualified works of architecture, sound recordings and broadcasting.

Similarly, the application of section 7(1) may be extended to the intent that the works made by or under the control of the Government of Malaysia *or of Nigeria* will enjoy copyright in both Malaysia and Nigeria.

There is nothing to be collected (to use the words of Parke B.) from section 20 or from any of the other sections of the statute that suggests that the words, phrases and sentences in sections 5, 6 and 7 should not be given a meaning other than their ordinary and natural meaning. The contention, that sections 5, 6 and 7 should be read as being interdependent with one or the other or the other two sections has no merit.

For the plaintiffs it was also contended that the ordinary and natural meaning of the sections leads to some manifest absurdity which calls for a construction to be given to the sections that does away with the absurdity. However, I have failed to find anything absurd in construing the sections using the literal rule. I have not even found anything that could be described as startling, the word used by counsel for the plaintiffs. There is nothing absurd or even startling about the "outsider" who being an architect erects his building here or being a writer of a book or song or a producer of a cinematograph film who has the first publication of his work here, being given copyright protection in Malaysia. On the contrary and as I have already premised, the scheme of the Act provides copyright protection in Malaysia that has the approbation of good sense and logic.

As has been seen, I have, and I did so with great respect and for the reasons given herein, differed with the *ratio* and the conclusions arrived at in the judgment in the *Mega Video* case[8] and with the judgment given on December 26, 1984 in respect of an interlocutory application *in Ipoh High Court Civil Suit No: 1631 of 1984*[9] (which is one of the instant three actions) in which the *Mega Video* case judgment was followed. With equal respect I have in effect applied the *ratio* of the judgment in the *Lee Yee Seng* case[10] and in the *Seremban Video Centre* case[11].

Accordingly, in my judgment, the answer to the question posed as the only issue to be tried in these three actions is that the said cinematograph films made in Hong Kong by the 1st defendant in

each of the actions being a body corporate constituted and vested with legal personality under the laws of Hong Kong and established in Hong Kong, is conferred copyright in Malaysia by virtue of section 6(1)(a) read with section 2(2)(c) whether there was an actual first publication in Malaysia or whether first publication in Malaysia is deemed pursuant to section 2(2)(c). In respect of each of the said films copyright is vested in its said Hong Kong author of it.

And accordingly each of the action is dismissed with costs.

[*The plaintiffs appealed to the Supreme Court against the above judgment.*]

SUPREME COURT.

N.T. Rajah for the appellants.

Datuk V.L. Kandan (*S.F Wong* with him) for the respondents.

Cur. Adv. Vult.

Abdoolcader S.C.J. (delivering the Judgment of the Court): The sole and primal issue arising for resolution in these proceedings as agreed between the parties is whether the first respondent which makes cinematograph films in Hong Kong acquires copyright in Malaysia under any of the provisions of the Copyright Act, 1969 by virtue of the first publication thereof in Malaysia, and this in effect involves and entails the contruction of the requisite provisions of the Copyright Act ('the Act'). To avoid tautology, all references to statutory provisions in this judgment relate to the Act.

The case in the court below was presented on the basis of a statement of agreed facts, briefly, to this effect: The first respondent is a limited company incorporated in Hong Kong and 'are the makers and owners of the copyright in certain cinematograph films in Hong Kong', the second and third respondents being respectively its licensee and sub-licensee in this country, and the films in question are video recordings to be shown on television screens for which purpose they are copied on to tapes for sale and hire as video cassettes. These films are published in Malaysia within thirty days of their publication in Hong Kong which is accepted as the first publication thereof. The appellants in a representative action suing on behalf of themselves and other members of the Perak Video tape Dealers Association issued a writ on October 20, 1984 seeking a declaration that the first repondent is not entitled to copyright in this country in respect of cinematograph films produced by it in Hong Kong and consequential injunctive relief and damages. V.C. George, J., in a careful and considered reserved judgment dismissed the appellants' claim on March 2, 1985 and they now appeal against that decision.

To epitomize the pertinent provisions of the Act: Section 3 provides that no copyright shall subsist otherwise than by virtue of the Act and section 4 enumerates the works eligible for copyright of which the author is a qualified person, *scilicet*, a citizen of or a permanent resident in Malaysia or a body corporate constituted and established in Malaysia. Section 6(1) confers copyright on every work eligible for copyright referred to therein which meets the specified requirements in relation to its publication, location, manufacture or transmission, and for the purposes of this judgment the pivotal provisions is paragraph (a) thereof in respect of a literary, musical or artistic work or cinematograph film first published in Malaysia. Anent the matter of publication section 2(2) enacts provisions for the purposes of the Act with respect to publication and the cardinal provision for consideration in the instant matter is paragraph (c) of that subsection which stipulates that a publication in any country shall not be treated as being other than the first publication by reason only of an earlier publication elsewhere, if the two publications took place within a period of not more than thirty days.

Another provision in the Act, the effect of which is in issue, is section 20 which empowers the Minister charged with the responsibility for trade and industry to make regulations extending the application of the Act in respect of any or all of the works referred to in section 4(1) to persons, corporations and works as specified therein in relation to a country which is a party to a treaty or a member of any convention or union to which Malaysia is also a party or a member as the case may be and which provides for protection of copyright in works which are protected under the Act.

The contention advanced by and for the appellants, basically, is that, predicated on the factuality of section 20, sections 5 and 6 must be read together, that copyright can only accrue in this country in relation to citizens of or permanent residents or bodies incorporated in Malaysia and that therefore section 6 can only apply if the author of an eligible work is a citizen of or a permanent resident in or a corporation constituted and established in Malaysia. Furthermore, with regard

to the question of publication under Section 6(1) (a), Mr. Rajah for the appellants submits that the functional operation of section 2(2) (c) is dependent on the implementation of section 20 and that the provisions of section 2(2) (c) are ambiguous as the words 'any country' in that paragraph might mean Malaysia or they might just as well exclude Malaysia, and indeed he goes on to declare that he frankly does not know what they actually mean.

Before turning however to consider and examine the propositions urged for the appellants, we should perhaps touch on what Mr. Rajah sought to take at the outset as a preliminary point as to whether video tapes are in fact cinematograph films. This point was never taken at any time or at any stage and was never in issue until it was raised before us, and it would appear to be clearly an afterthought, and a very recent one at that, perhaps broached now for the first time as a secondary line of attack for good measure, as in the statement of agreed facts it is expressly agreed that the subject matter and the copyright in issue all pertain to cinematograph films. Mr. Rajah, however, only faintly raised this point to draw our attention to it, as he put it, conceding that he was not pressing it, and indicated that he was prepared to leave the matter to the definition of 'cinematograph film' in the Act.

Since the point has however been raised we need only say that in our view video tapes come plumb within the definition of 'cinematograph film' in section 2(1) as the first fixation of any sequence of visual images on material of any description (whether translucent or not) so as to be capable, by use of that material, (a) of being shown as a moving picture, or (b) of being recorded on other material (whether translucent or not) by the use of which it can be so shown, and it includes the sounds embodied in any associated sound track. The definition does not require that the visual images should be in a state ready for projecting in order to qualify as a cinematograph film and it would be enough that they be recorded on any material, translucent or otherwise, and that it should be possible to translate them into a moving picture – a conclusion evident even without having recourse to the *reddendo singula singulis* canon of construction, *scilicet*, that words should be read distributively. Films for television purposes often consist of video tapes which are records on tape of electrical impulses, that is to say, by the use of magnetic impulses the light images are recorded on magnetic tape which can afterwards be used to produce a moving picture. The definition of 'cinematograph film' in section 2(1) makes no reference to cinematography or any other process, but concentrates chiefly on the essential characteristic of a sequence of visual images capable of being shown as a moving picture. So much then for this digression into the nature and characterization of video tapes.

We now advert to an examination of the relevant provisions of the Act in the light of the contentions urged on behalf of the appellants. Sections 5, 6 and 7 operate each in accordance with its specific provisions to confer copyright. We have previously referred to sections 5 and 6 and would only add, briefly, that section 7 confers copyright on works of Government and international bodies. It will be noted that each of these sections provides that 'copyright shall be *conferred*' and it goes on in each case to say '*by this section*' on '*every* work eligible for copyright' in the circumstances specified. Section 6 does not refer to the author of the work at all. Where copyright is conferred by sections 5, 6 and 7 then the vesting of the copyright in specifying the first ownership thereof is provided for by section 12, vesting it in the case of sections 5 and 6 initially in the 'author' as defined in section 2(1) read with the provisions of section 12(1), with a distinct and separate provision in section 12(2) in relation to copyright conferred under section 7. It will be seen that in providing for the vesting of copyright section 12(1) specifically refers to sections 5 and 6 disjunctively.

To consider the inter-relationship if any between sections 5 and 6 in the context of the appellants' argument, it might perhaps be useful to refer to the marginal notes to these two sections. A side note or marginal note to a section is part of the statute. It may be considered in construing the section or any other provision of the statute, provided due account is taken of the fact that its function is merely to serve as a brief guide to the content of the section. Collins, M.R., in *Bushell* v. *Hammond*[12] took the approach that the marginal note, while forming no part of the section, was of some assistance as it showed the drift of the section. In *Reg.* v. *Schildkamp*[13], Lord Reid and Lord Upjohn took the view that the marginal or side note will rarely be of any use in interpreting a statute but that they should not be rejected completely as aids, the former putting this (at page 10) on the basis that it is the whole statute that is the product of the legislature and that therefore the whole statute can be looked at if any doubt should arise as to its meaning.

The marginal note to section 5 reads 'Copyright by virtue of citizenship or residence' and that to section 6 'Copyright by reference to country of origin'. It is therefore abundantly clear that they are distinct provisions to be read separately and operating independently of each other in the light of the opening provisions of each of these sections we have adverted to. If as is contended they have to be read conjunctively then the whole scheme thereby created must necessarily be spurious and be looked at askance in view of the provisions of section 7 and the specific enactment in subsection (4) of that section providing that sections 5 and 6 shall not be taken to confer copyright on works to which section 7 applies. We would pause to observe that section 7(4) too specifically refers to sections 5 and 6 as distinctive provisions.

Section 5(2) prescribes the periods for the subsistence of copyright conferred by that section and section 6(2) adopts the same duration as is provided for in section 5 in respect of copyright conferred by section 6 in relation to the same type of work. Now if sections 5 and 6 are indeed intended to be read conjunctively, quite apart from the fact that there would be no reason why they could not have been enacted together as a composite section, section 6(2) would be wholly unnecessary and redundant. The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded. In *Quebec Railway, Light, Heat and Power Co. Ltd.* v. *Vandry*[14], Lord Sumner in delivering the judgment of the Judicial Committee said (at page 676):

"Secondly, there is no reason why the usual rule should not apply to this as to other statutes – namely, that effect must be given, if possible, to all the words used for the legislature is deemed not to waste its words or to say anything in vain."

The Judicial Committee applied and followed this case in *Enmore Estates Ltd.* v. *Darson*[15] (at page 506).

Section 5 does not postulate publication as a prerequisite to its operation and section 6 on its ordinary meaning clearly provides for situations not covered by section 5. The absence of any nexus or interaction between sections 5 and 6 would in our view appear to be as clear and evident as that we found between the Act and the Films (Censorship) Act, 1952 in *Asia Television Ltd. & Anor.* v. *Viwa Video Sdn. Bhd.*[16]. This is substantiated by the fact that if the appellants are correct in their contention, then section 6(1) would again be mere surplusage for the purposes of acquisition of copyright, as section 5 would have operated previously in the first instance to confer it, since section 5 confers copyright on *every* work eligible for copyright of which the author is a qualified person as defined in section 5(1).

One further point: Paragraph (d) of section 6(1) which refers to a broadcast transmitted from Malaysia is followed by a qualification 'and which has not been the subject of copyright conferred by section 5 of this Act'. Although as a matter of printing there does not appear to be a space between paragraph (d) and the sentence we have referred to, we would think that the parenthesis in question which appears after paragraph (d) of section 6(1) is intended to and does in fact apply to and qualify all the four paragraphs (a) to (d) of that subsection, and this is borne out by the marginal note and the provisions of subsection (2) of section 6. Even if however it qualifies only paragraph (d) of section 6(1) it would still clearly negate any suggestion that sections 5 and 6 are to be read together as it would deprive the provisions of that paragraph of any sense if we accept the appellants' contention, as on the premise of their argument there can be no question of the work referred to in paragraph (d) not also being the subject of copyright conferred by section 5.

We should perhaps reiterate that the starting point in statutory interpretation is to consider the ordinary meaning of the word or phrase in question, that is its proper and most known signification. Some three months ago Lord Scarman in delivering the leading judgment of the House of Lords in *South West Water Authority* v. *Rumble's*[17] said (at page 411):

". . . . . the language of the two paragraphs consists of ordinary English words which possess by their very imprecision the flexibility which is the hallmark of the English language, and which is one of the reasons for the survival of English as a living and worldwide tongue. I have no doubt that it would be contrary to the legislative purpose of the enactment to restrict or refine their breadth and flexibility in the context of this legislation, which has to cover a wide range of circumstances and situations present and future. A restrictive interpretation of the legislature's language would defeat the broad purpose of this innovative and reforming statute."

We are of the view that the provisions of the Act under consideration before us call for a pur-

posive and literal construction which is one which follows the literal meaning of the enactment where that meaning is in accordance with the legislative purpose and applies where the literal meaning is clear and reflects the purposes of the enactment. We can in the circumstances we have discussed see no justification or warrant to read the provisions of sections 5 and 6 together so as to restrict the application of section 6 only to works eligible for copyright as specified therein of which the author is a qualified person as defined in section 5. The provisions of the Act are abundantly clear to refute any resort to a purposive and strained construction which requires a strained meaning where the literal meaning is not in accordance with the legislative purpose. In *Reg.* v. *Broadcasting Complaints Commission, Ex parte Owen*[18], it was held that the converse is not correct, namely, that it is legitimate to adopt a purposive construction so as to prevent the application of a statute to a situation which on its purely literal construction it would apply. This is what we think the appellants are seeking to persuade the court to do.

We now turn to the argument for the appellants that section 2(2) (c) is ambiguous and that in the absence of the implementation of the provisions of section 20 there is no qualifying country to which section 2(2) (c) could or would apply. We do not think that there is any warrant to construe section 2(2) (c) so as to make its operation dependent upon the implementation of section 20. We are unable to see how the implementation *vel non* of the provisions of section 20 can affect or alter the ordinary and natural connotation of the other provisions of the Act. The distinction between motive and intention in respect of a legislative measure is that the former relates to the policy for the enactment of the legislation in that way at that time for that purpose and the latter relates to the legal meaning of the enactment. The court is concerned with motive only to the extent that it may throw light on intention. It is the legal meaning of the enactment that in the end matters to the court, not the reason why it was passed.

Mr. Rajah seeks to refer to the explanatory statement to the Bill which later was enacted as the Act and which makes reference to two international conventions on copyright. We need only say it is not generally permissible to refer to the explanatory statement for purposes of statutory interpretation [*Escoigne Properties Ltd.* v. *Inland Revenue Commissioners*[6] (at page 566); *Katikiro of Buganda* v. *Attorney General*[19] where the Judicial Committee refused to look at a White Paper; *Hadmor Productions Ltd.* v. *Hamilton*[20] (at page 232)]. It is also not permissible to resort to the terms of any international convention or treaty if there should be any ambiguity in a statute and aid were needed to construe it unless the latter was patently intended to carry out the terms of the convention or treaty, which is not the case here [*Salomon* v. *Commissioners of Customs and Excise*[5]]. We should perhaps also refer to the decision of the Privy Council some two months ago in *Winfat Enterprise (HK) Co. Ltd.* v. *Attorney-General of Hong Kong*[21] in which the question arose as to the effect of certain Hong Kong Ordinances relating to tenure of land ceded to the British Crown under the Peking Convention of 1898 between the Emperor of China and the British Crown, when Lord Diplock in delivering the judgment of the Judicial Committee said (at page 792):

> "The relevant Ordinances are unambiguous and their Lordships agree with the courts below that there is no ground for recourse to the principle of *Salomon* v. *Commissioners of Customs and Excise* [1967] 2 Q.B. 116 in an attempt to construe their unambiguous words so as to give effect to some guess, for it can be no more, as to what was intended by the respective sovereigns to be meant by the paragraph in the Convention which their Lordships have already cited."

We can see no ambiguity in section 2(2) (c), and on the provisions of the Act as they now stand 'any country' must necessarily mean Malaysia and would include any other qualifying country to which the Act is extended under the provisions of any regulations if and when made under section 20. In the matter before us there was publication in Hong Kong in the first instance, and upon publication in Malaysia within a period of thirty days of the earlier publication in Hong Kong within the intendment of section 2(2) (c), the provisions of section 6(1) (a) would operate to confer copyright on the films in question. The first respondent as the author is accordingly vested under section 12 with copyright in respect thereof.

As we have stated at the outset the whole case turns on a question of statutory construction. In *Seaford Court Estates Ltd.* v. *Asher*[22] Denning, L.J., said (at page 499): "A judge must not alter the material of which it (the prescript) is woven, but he can and should iron out the creases." What we are however asked to do in this case is not to iron out any creases (and there are none in any event perceptible in the Act) but to replace the material of the Act with linen of the appellants' choice, which is certainly not the business of the

court. Any such exercitation would mutate and indeed mutilate the intention of the legislature and amount to unwarranted judicial transgression into the legislative domain. To accept the submissions put to us on behalf of the appellants would be to countenance in the realm of statutory construction a free-for-all like the aftermath of an English football match.

We accordingly at the conclusion of argument for the reasons we have discussed dismissed this appeal with costs and directed the deposit lodged in court by way of security to be paid out to the respondents.

Appeal dismissed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Shearn Delamore & Co.*

Cur. Adv. Vult.

T.R. HAMZAH & YEANG SDN. BHD. v. LAZAR SDN. BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah F.JJ.) March 21 & 23; September 22, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 46 of 1983]

Architects – Claim for balance of professional fees – Dispute – Counterclaim for negligence – Architect terminating his employment and refusing to issue letter of release to enable another architect to be employed – Application to court for architect to issue letter of release – Order made – Appeal – Architect's lien on plans – Licence to use plans – P.A.M. Conditions of Engagement.

Practice and Procedure – Interlocutory application – Interim injunction – Perpetual injunction – Mandatory order – Forms in Schedule – Variations – R.H.C. 1980, O.1 r.7 & O.29 r.1.

In this case the respondent employed the appellant, a firm of architects to build a 27 storey office building at Jalan Ampang on the usual terms as defined by the Pertubuhan Arkitek Malaysia (P.A.M.) conditions of engagement. The overall fee agreed was 4% of the total contract cost of the project. While approval of the plans was still under consideration by the relevant authority, the appellant sued the respondent for balance of the professional fees of $514,000.00. The respondent denied the claim and counterclaimed for breach of contract. Subsequently the appellant terminated its services as architects on the ground of failure of payment of fees. The respondent requested that the dispute be referred to the P.A.M. for decision and pending reference that the appellant should issue a letter of release to enable them to engage another architect to continue with the work. The appellant denied the request and said that until all the fees were paid they would not issue a letter of release. The respondent applied by summons-in-chambers for an order that the appellant forthwith issue the respondent with a letter of release to enable the respondent to engage another architect to proceed with the proposed construction of the building. The learned Judge of the High Court made an order in terms. The appellant appealed.

Held: that in the circumstances of this case, the court could not allow the architect to withhold the letter of release as to do so would mean "that the architect can hold the client to ransom".

Cases referred to:

(1) *Blair* v. *Osborne & Tomkins* [1971] 2 Q.B. 78, 86.
(2) *Caldwell* v. *Sumpters* [1972] Ch. 478.
(3) *Stovin-Bradford* v. *Volpoint Ltd.* [1971] Ch. 1007.
(4) *Gebruder Naf* v. *Ploton* (1890) 25 Q.B.D. 13.
(5) *Morgan* v. *Greatrex* (1884) W.N. 21.
(6) *Soon Nam Co. Ltd.* v. *Archynamics Architects* [1979] 1 M.L.J. 212.
(7) *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] 1 All E.R. 504, 510.
(8) *Gibb & Co.* v. *Malaysia Building Society Bhd.* [1982] 1 M.L.J. 271.
(9) *Richards* v. *Richards* [1983] 3 W.L.R. 173.
(10) *Wah Loong (Jelapang) Tin Mine Sdn. Bhd.* v. *Chai Ngen Yiok* [1975] 2 M.L.J. 109.
(11) *Sivaperuman* v. *Heah Seok Yeong Realty Sdn. Bhd.* [1979] 1 M.L.J. 150.
(12) *Ratnam* v. *Cumarasamy & Anor.* [1965] 1 M.L.J. 228.
(13) *Jackson* v. *Normanby Brick Co.* [1899] 1 Ch. 438.
(14) *Davies* v. *Gas Light and Coke Co.* [1909) 1 Ch. 708.
(15) *Re Court Hill Canteen* [1972] 2 M.L.J. 257.
(16) *Astro Exito Navegacion S.A.* v. *Southland Enterprise Co. Ltd. & Anor.* [1982] 3 All E.R. 335.
(17) *Smith* v. *Peters* (1875) L.R. 20 Eq. 511.
(18) *Ebdy* v. *M'Gowan, Hudson* Building Contracts 4th edition Vol. III p.9.

HIGH COURT.

P. Cumaraswamy for the defendant (applicant).

S. Narayanan for the plaintiff.

Cur. Adv. Vult.

Chan J.: This case raises points of great interest to architects and to those who employ them professionally.

T.R. Hamzah & Yeang Sdn. Bhd. is a limited company. It is a firm of architects. It is the plaintiff in these proceedings. The defendant, Lazar Sdn. Bhd. employed Hamzah & Yeang as architects for a project to put up a 27-storey building at Jalan Ampang, Kuala Lumpur. The architects accepted